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# NFL NATIONAL ANTHEM PROTESTS: AN IMPENDING LABOR LAW VIOLATION?

M'KENZEE GALLOWAY\*

## I. INTRODUCTION

Controversy. You see it every day, and there is plenty of it in the sports world. Political debates and protests have consumed the media the last two years and have since seeped into the sports world. Perhaps one of the most notable political sports controversies of 2017 was the National Football League (NFL or the League) players' national anthem protests. Throughout the 2016 and 2017 NFL seasons at least one player remained seated, remained in the locker room, or kneeled during the national anthem each week. These protests got attention from all forms of media outlets with political figures, including the President, and different legal scholars weighing in. Most of the conversation centers around whether protesting the national anthem was the right course of action. Throughout this discussion one question kept getting asked—can the NFL or a team owner discipline these players in any way to effectively end the protests and restore everyone's attention back on the game, or would it be illegal to do so? After the 2017 season there has been hardly any media attention on the NFL protests, however the question still remains—is it legal for the NFL or a team to discipline or fire a player for protesting the national anthem?

Most people believe that the NFL or its owners would be infringing on these players' First Amendment rights under the United States Constitution if they were to discipline the players. However, the NFL and the owners are not considered state actors so any United States Constitutional claim against the NFL or its owners would fail. Even without Constitutional claims players could still have a claim under the National Labor Relations Act (NLRA) which governs the NFL and its owners' relationships with its employees, the players.<sup>1</sup>

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Are these protests protected under the NLRA? Can an owner discipline or even fire a player for participating in these protests?

This Comment will first discuss the history of the NFL players' national anthem protests and explain the specific legal issue. It will also look at the current law and the prior legal history concerning protests in the workplace. This Comment will then provide an analysis of the legal issue under the current law and legal precedent. Finally, this Comment will provide potential solutions to issue.

This Comment will ultimately illustrate why any potential claim the players would have under the NLRA will most likely fail. If the NFL or a team owner chooses to discipline players for participating in the national anthem protests the players will most likely not be protected. The players are not protesting about working conditions and for that reason the protests will not be viewed as protected concerted activity under the NLRA. Even though these players will most likely not have a claim under the NLRA for any disciplinary action taken against them for protesting, this does not mean that disciplining these players is the correct course of action for the NFL or its owners to take. This is a complex issue that needs to be fully evaluated by all parties involved before any course of action can be taken regarding these national anthem protests.

## II. BACKGROUND

This section will outline how the NFL national anthem protests began in 2016. Then, this section will discuss the backlash that has occurred since Colin Kaepernick first explained his protest. This section will also discuss how this national anthem protest is not the first of its kind, how it has changed, how the protest has spread to different sports. This section will conclude with a discussion of the fact that there is still no solution to this issue.

### *A. How It All Began*

Before the national anthem protests became the movement that it is today, only one NFL player partook—Colin Kaepernick.<sup>2</sup> His protest went virtually unnoticed for the first two games he decided to abstain from standing for the national anthem. It was not until the third preseason game of the 2016 season that the media began to realize that Kaepernick was sitting during the national

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1. This issue may also raise questions concerning other federal statutes as well as contract law, but this Comment's sole focus is on whether a NFL owner's choice or the NFL's choice to discipline or fire a player for protesting the national anthem would constitute a labor law violation.

2. See Adam Stites, *Everything You Need to Know About NFL Protests During the National Anthem*, SB NATION (Oct. 19, 2017), <https://www.sbnation.com/2017/9/29/16380080/donald-trump-nfl-colin-kaepernick-protests-national-anthem>.

anthem. After that third game, there were many questions about why Kaepernick was sitting during the national anthem. Kaepernick explained that he was sitting during the national anthem to protest and bring awareness to the racial oppression and police brutality going on in America.<sup>3</sup> The protests began with Kaepernick sitting on the bench during the anthem, until he subsequently chose to escalate his protests and ultimately knelt on the sidelines next to his teammates.<sup>4</sup> Kaepernick knelt the entire 2016 season until he became a free agent.<sup>5</sup> Even though Kaepernick and other NFL players did gain some media attention for his protests throughout the 2016 NFL season, the NFL players did not receive near as much media attention as they did during the 2017 NFL season.<sup>6</sup> Along with this heightened media attention came severe backlash.

### *B. Backlash Heightens*

The national anthem protest picked up traction during the 2017 NFL season with a majority of the teams having at least one player protesting the national anthem at least once throughout the season.<sup>7</sup> With the increase in NFL players protesting the national anthem, political figures began weighing in on the protests. The most notable comment by a political figure about these protests came from President Donald Trump in September 2017.<sup>8</sup> In a series of tweets, President Trump stated “[i]f a player wants the privilege of making millions of dollars in the NFL, or other leagues, he or she should not be allowed to disrespect . . . our Great American Flag (or Country) and should stand for the national anthem. If not, YOU’RE FIRED. Find something else to do!”<sup>9</sup> President Trump continued to tweet about the national anthem protests and proclaimed that the loss in NFL’s television ratings and attendance was a direct effect of the players’ protests.<sup>10</sup> Soon after the President’s tweets, Vice President Mike Pence left an Indianapolis Colts game after multiple San

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3. *Id.*

4. *Id.*

5. *Id.*

6. Since the writing of this Comment, Kaepernick still has not been picked up by another NFL team and filed a collusion action against the NFL and its member clubs. The collusion action was eventually settled in February 2019. Kevin Draper & Ken Belson, *Colin Kaepernick and the N.F.L. Settle Collusion Case*, N.Y. TIMES, Feb. 15, 2019, <https://www.nytimes.com/2019/02/15/sports/nfl-colin-kaepernick.html>.

7. Stites, *supra* note 2.

8. *Id.*

9. Michael McCann, *Donald Trump: The Legality of NFL Owners ‘Firing’ Players*, SPORTS ILLUSTRATED, Sept. 23, 2017, <https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest>.

10. Stites, *supra* note 2.

Francisco 49ers players knelt during the national anthem.<sup>11</sup> These two instances led to Dallas Cowboys owner Jerry Jones stating, “[i]f there’s anything that is disrespectful to the flag, then we will not play, understand? We will not . . . if we are disrespecting the flag, then we will not play. Period.”<sup>12</sup> A labor union in Texas even filed a complaint with the National Labor Relations Board (NLRB) against Jones, claiming these comments violated the NLRA.<sup>13</sup>

Eventually NFL Commissioner Roger Goodell sent a letter to all thirty-two teams stating he wants the players to stand for the national anthem.<sup>14</sup> However, the letter did not give specifics about how Goodell and the NFL planned to make sure the players stood during the anthem or whether the NFL would take any disciplinary action if the players did not stand.<sup>15</sup> Goodell did note that the NFL planned to continue the discussion about the protests at the NFL’s fall meetings with hopes to come to an agreement as to how to approach the protests.<sup>16</sup> However, the NFL’s policy in the fall of 2017 only *recommended* the players stand for the national anthem, it did not require them to do so.<sup>17</sup> Ultimately, the NFL came out of its 2017 fall meetings with no resolution to the protests, but instead, most owners collectively agreed they did not want to make a rule forcing the players to stand.<sup>18</sup>

Just prior to President Trump’s comments, but still in the midst of the national anthem protests, several NFL players formed the “Players Coalition” in response to the “violent events in Charlottesville.”<sup>19</sup> The Players Coalition is a group of approximately forty players within the NFL who are in constant communication and help each other promote the message of racial equality and

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11. *Id.*

12. Todd Archer, *Dallas Cowboys Owner Jerry Jones Says Any Player Who ‘Disrespects’ Flag Won’t Play*, ESPN (Oct. 9, 2017), [http://www.espn.com/nfl/story/\\_/id/20961541/dallas-cowboys-owner-jerry-jones-says-player-disrespects-flag-play](http://www.espn.com/nfl/story/_/id/20961541/dallas-cowboys-owner-jerry-jones-says-player-disrespects-flag-play).

13. Todd Archer, *Labor Union Files Complaint Over Cowboys’ Jerry Jones’ National Anthem Mandate to Team*, ESPN (Oct. 11, 2017), [http://www.espn.com/nfl/story/\\_/id/20984095/labor-union-files-complaint-cowboys-jerry-jones-national-anthem-mandate-team](http://www.espn.com/nfl/story/_/id/20984095/labor-union-files-complaint-cowboys-jerry-jones-national-anthem-mandate-team).

14. Kevin Seifert, *Roger Goodell Sends Letter to NFL Teams, Wants Players to Stand During National Anthem*, ESPN (Oct. 11, 2017), [http://www.espn.com/nfl/story/\\_/id/20980456/roger-goodell-sends-letter-nfl-teams-wants-players-stand-national-anthem](http://www.espn.com/nfl/story/_/id/20980456/roger-goodell-sends-letter-nfl-teams-wants-players-stand-national-anthem).

15. *Id.*

16. *Id.*

17. *Id.*; Mark Maske, *NFL, Players Coalition Reached a Deal, But Don’t Expect Anthem Protests to Stop*, WASH. POST, Dec. 2, 2017, [https://www.washingtonpost.com/news/sports/wp/2017/12/02/nfl-players-coalition-reached-a-deal-but-dont-expect-anthem-protests-to-stop/?utm\\_term=.85ac6a8550ce](https://www.washingtonpost.com/news/sports/wp/2017/12/02/nfl-players-coalition-reached-a-deal-but-dont-expect-anthem-protests-to-stop/?utm_term=.85ac6a8550ce).

18. Maske, *supra* note 17.

19. Sameer Rao, *NFL Players Discuss Anti-Racist Actions, Announce #PlayersCoalition in New Video*, COLORLINES (Sept. 7, 2017), <https://www.colorlines.com/articles/nfl-players-discuss-anti-racist-actions-announce-playerscoalition-new-video>.

criminal justice reform at the grassroots level.<sup>20</sup> The Players Coalition eventually met with and came to an agreement with the NFL for the team owners and the league to donate about \$90 million to social activism causes.<sup>21</sup> This deal did not specifically address the national anthem protests, but there was hope that it would lead to some of the players ending their protests.<sup>22</sup> Even though the NFL, its owners, and its players attempted to come to a solution, nothing ultimately worked and the protests continued throughout the 2017 season.

### *C. Still No Resolution*

Back in August 2016, there was just one athlete sitting on the bench as the national anthem played, which went virtually unnoticed during the first two games it occurred.<sup>23</sup> Since that first demonstration, the protest has spread throughout the NFL and across multiple sports.<sup>24</sup> The athletes that are protesting the national anthem have not yet been suspended or disciplined by the NFL or its member clubs. Many of the athletes that continue to protest the anthem choose to kneel; however, others have sat or stood with a raised fist throughout the national anthem.<sup>25</sup> The protests have received both praise and criticism from football fans and non-football fans alike; in a nationwide survey, twenty-four percent of people responded that they strongly approved of the protests while thirty-eight percent stated that they strongly disapproved of the protests.<sup>26</sup> However, the comments from President Trump along with Jones' comments regarding the protest, as well as a Texas labor union filing a claim against Jones, all raised the question of whether a NFL player could in fact be disciplined or fired if they continued to protest.<sup>27</sup>

Most people are not aware that this is not the first national anthem protest to occur within professional sports. In 1996, Mahmoud Abdul-Rauf, formerly

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20. *Id.*

21. Maske, *supra* note 17.

22. *Id.*

23. Stites, *supra* note 2.

24. *Id.*

25. *Id.*

26. See generally *ESPN Survey Shows Americans Interested, Divided on NFL Protests During National Anthem*, ESPN (Sept. 29, 2017), [http://www.espn.com/nfl/story/\\_/id/20858557/espn-survey-shows-americans-interested-divided-nfl-protests-national-anthem](http://www.espn.com/nfl/story/_/id/20858557/espn-survey-shows-americans-interested-divided-nfl-protests-national-anthem).

27. See Marc Edelman, *Can the NFL Really Fire Players For Kneeling During the National Anthem?*, FORBES, Sept. 28, 2017, <https://www.forbes.com/sites/marcedelman/2017/09/28/nfl-trump-kneeling-national-anthem/#1a52b6642976>. See generally Benjamin Sachs, *Benching NFL Players for Protesting During the Anthem Would Be Illegal*, VOX (Oct. 15, 2017), <https://www.vox.com/the-big-idea/2017/10/14/16473534/benching-nfl-players-taking-knee-illegal-labor-law>.

known as Chris Jackson, chose not to stand for the national anthem prior to a National Basketball Association (NBA) game.<sup>28</sup> Rather than standing for the anthem Abdul-Rauf chose to either stretch or stay inside the locker room.<sup>29</sup> When he was asked why he decided not to stand for the national anthem he gave similar reasons to Kaepernick. Abdul-Rauf stated that he saw the flag as a symbol of racism and oppression.<sup>30</sup> He stated that this symbol conflicted with his Islamic faith, and that “[y]ou can’t be for God and for oppression.”<sup>31</sup> Abdul-Rauf’s decision not to stand ultimately lead to him being suspended.<sup>32</sup>

Abdul-Rauf’s protest and the NFL protest differ in two respects. First, the NBA had a rule in place that governed Abdul-Rauf’s actions. The rule the NBA had in place required players to “line up in a dignified posture” for the national anthem.<sup>33</sup> Abdul-Rauf’s suspension would last as long as he continued to violate this rule. Second, Abdul-Rauf’s decision to not stand for the national anthem was for religious reasons as opposed to political or social reasons.

Prior to 2018 there was no rule regarding the national anthem within the NFL. “In May [2018], the NFL owners passed a new policy that would require players to stand on the sideline during the playing of the national anthem.”<sup>34</sup> If the players did not want to stand, the players would have to remain in the locker room while the national anthem was played. If players violated this new rule, teams could discipline the players as they saw fit, leaving the punishment of players up to the individual teams.<sup>35</sup> The NFL did not consult the National Football League Players Association (NFLPA) prior to instituting this policy and as a result the NFLPA filed a grievance.<sup>36</sup>

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28. See Jesse Washington, *Still No Anthem, Still No Regrets for Mahmoud Abdul-Rauf*, UNDEFEATED (Sept. 1, 2016), <https://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem/>; see also Jim Hodges, *NBA Sits Abdul-Rauf for Stance on Anthem*, L.A. TIMES, Mar. 13, 1996, [http://articles.latimes.com/1996-03-13/sports/sp-46409\\_1\\_mahmoud-abdul-rauf](http://articles.latimes.com/1996-03-13/sports/sp-46409_1_mahmoud-abdul-rauf).

29. Washington, *supra* note 28.

30. *Id.*

31. *Id.*

32. *Id.*

33. Hodges, *supra* note 28.

34. Lindsay H. Jones, *Dolphins Owner Stephen Ross Attempts to Clarify National Anthem Policy*, USA TODAY, July 20, 2018, <https://www.usatoday.com/story/sports/nfl/dolphins/2018/07/20/dolphins-owner-stephen-ross-clarifies-national-anthem-policy-placeholder/809626002/>.

35. See *id.*; see also Jeff Darlington, *NFL, NFLPA Agree to Freeze National Anthem Rules*, ESPN (July 20, 2018), [http://www.espn.com/nfl/story/\\_/id/24143418/nfl-nflpa-agree-freeze-national-anthem-rules](http://www.espn.com/nfl/story/_/id/24143418/nfl-nflpa-agree-freeze-national-anthem-rules).

36. Jones, *supra* note 34. It should be noted that a policy of this nature may be considered a mandatory subject of collective bargaining. See National Labor Relations Act, 29 U.S.C. § 158(d) (2019); see also *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995). If it is a mandatory subject of collective bargaining, then the NFL would be required to bargain with the Players Association about a national anthem policy until impasse prior to unilaterally instituting this kind of policy. See *Silverman*, 880 F. Supp. at 257.

As a result of this new policy, the Miami Dolphins sent a memorandum to the NFL outlining the team's proposed discipline policy if a player chose to protest the national anthem. The memorandum stated that the team would potentially fine or suspend any player who protested.<sup>37</sup> In July 2018, the NFL and the NFLPA announced that no new rules would be created or enforced until both sides reached an agreement.<sup>38</sup> As of the writing of this Comment, the NFL's official policy requires players to stand for the national anthem, however if a player chose to protest the anthem they would not be disciplined.<sup>39</sup> The reason this continues to be an issue and the main reason this could potentially turn into a legal action is because there is still no provision within the NFL Collective Bargaining Agreement (CBA) that governs what the players are required to do during the national anthem or if a player can be punished or fired for continuing to protest.<sup>40</sup>

### III. CURRENT LAW AND PRIOR LEGAL HISTORY

Before completing a full analysis on the potential NLRA claim a player could bring against the NFL or a specific team if the player was disciplined for protesting, it will be helpful to discuss the current law as well as the prior legal precedent that will guide the analysis. This section will first outline the law as it is today and will also discuss legal precedent that will illustrate how a court today would most likely come to a decision on this issue.

#### *A. National Labor Relations Act*

As mentioned previously, any First Amendment United States Constitutional claim that a player would file against the NFL or a team owner for being disciplined or fired for protesting the national anthem would fail.<sup>41</sup> The NFL is a private entity and each team is also a private entity.<sup>42</sup> Since the NFL and its teams are not state actors, the players do not receive the same first amendment protections and guarantees as against the government.<sup>43</sup> The United States Constitution, which includes the First Amendment, protects citizens from

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37. Jones, *supra* note 34.

38. Darlington, *supra* note 35.

39. Adam Stites, *Here's What the NFL's Halted Anthem Policy Means for Players and Teams*, SB NATION (Sept. 9, 2018), <https://www.sbnation.com/2018/7/23/17596078/nfl-national-anthem-policy-ramifications>.

40. See Seifert, *supra* note 14.

41. See Edelman, *supra* note 27.

42. *Id.*

43. *Id.*



governmental action such as censorship.<sup>44</sup> Since the NFL and its teams are private entities, player discipline is instead regulated by the NLRA.<sup>45</sup>

Therefore, instead of focusing on potential constitutional claims that a player may have, this Comment will focus on potential claims a player could make under the NLRA. The NLRA was enacted to govern relationships between employers and employees in the private sector.<sup>46</sup> The NLRA does not apply to federal, state, or local governments.<sup>47</sup> Its “statutory jurisdiction [is] over private sector employers whose activity in interstate commerce exceeds a minimum level;”<sup>48</sup> this jurisdiction is very broad and the NFL and its owners fall within this jurisdiction.

The two main sections of the NLRA that are the most relevant to this issue are Section 7 and Section 8(a)(1).<sup>49</sup> Section 7 is relevant because it protects the employees right to “engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection.”<sup>50</sup> Section 7 protects employees’ participating in protected concerted activity from retaliation or discipline from their employer for partaking in protected concerted activity.<sup>51</sup> Concerted activity is not explicitly defined in the NLRA, so it is important to look to relevant case law to discern what is protected activity and what is not.

### 1. Concerted Activity

Section 7 states that an employee has a right to “engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.”<sup>52</sup>

In 1962, the Supreme Court stated that an employee does not have to make a specific demand to the employer, before engaging in protected concerted activity.<sup>53</sup> A group of machine shop workers in Baltimore, Maryland decided to walk out of work because of the frigid temperatures inside the shop.<sup>54</sup> The foreman implicitly told the employee that they should all just leave, so after

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44. *Id.*

45. *Jurisdictional Standards*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited May 9, 2019).

46. *Id.*

47. *Id.*

48. *Id.*

49. National Labor Relations Act, 29 U.S.C. § 157 (2019); 29 U.S.C. § 158(a)(1) (2019).

50. 29 U.S.C. § 157.

51. *Id.*

52. *Id.*

53. *See N.L.R.B. v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

54. *Id.* at 11.

some discussion that is exactly what they did.<sup>55</sup> The company president then immediately arrived at the shop and stated that all of the employees who left would be terminated.<sup>56</sup> The Supreme Court held that the walkout was protected concerted activity.<sup>57</sup> The Court stated that:

Employees [do not] necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made.<sup>58</sup>

Therefore, employees do not have to notify their employers before engaging in concerted activity for that concerted activity to be protected.

In a later case the Supreme Court stated that reasonableness is a factor in determining if the employee's action is protected or not.<sup>59</sup> The Court held that

[a]s long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, [then] there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity . . . .<sup>60</sup>

An employee acting alone can even be considered to be engaging in protected concerted activity, according to the court in *Compuware Corp. v. National Labor Relations Board*.<sup>61</sup> Laurence Schillinger, a Compuware employee, often discussed different work-related issues with other employees.<sup>62</sup> Compuware was completing a contract for another company, Peat Marwick, to upgrade the State's computer system.<sup>63</sup> Compuware eventually fired Schillinger at the direction of Peat Marwick since Schillinger had threatened to take his work-related concerns to the State, which violated a work rule instituted by Peat

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55. *Id.* at 11-12.

56. *Id.* at 12.

57. *Id.* at 14.

58. *Id.*

59. See *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984).

60. *Id.*

61. 134 F.3d 1285, 1288 (6th Cir. 1998).

62. *Id.* at 1287.

63. *Id.*

Marwick.<sup>64</sup> The court held that the “conduct of an individual employee may be considered ‘concerted activity’ if the employee’s actions are ‘made on behalf of other employees or at least . . . made with the object of inducing or preparing for group action.’”<sup>65</sup>

As long as the employee’s actions are for the purpose of furthering the entire group’s goals, then even if the employee acted individually the action can still be protected concerted activity.<sup>66</sup> Even though no other employee testified that they authorized Schillinger to represent their interests, this did not necessarily undermine the holding that Schillinger’s action would have been protected concerted activity.<sup>67</sup> The court found the record to indicate that if Schillinger was able to bring up these concerns at the work meeting, he would have stated these concerns as group concerns and he expressed these concerns to other employees and managers.<sup>68</sup> The evidence indicates that Schillinger’s interest and effort in getting the company to address these concerns was on behalf of the employees as a group, which is a protected concerted activity.<sup>69</sup> So, as long as an employee is acting on behalf of the group, even if they are acting individually, the employee’s action is protected concerted activity.<sup>70</sup>

It is clear from the previous case law that employees do not have to give advance notice to their employer when they are choosing to partake in protected concerted activity,<sup>71</sup> if employee’s are exercising a right in which they have a reasonable and honest belief that they have under their collective bargaining agreement then that activity is protected concerted activity,<sup>72</sup> and even an individual employee’s action can be protected concerted activity if their action is for the purpose of further the group objective.<sup>73</sup> However, none of these previous cases address the most important question applicable to this issue; can political activity be protected concerted activity?

The Supreme Court answered that very question in *Eastex, Inc. v. National Labor Relations Board*.<sup>74</sup> In this case a group of employees wanted to pass out a union newsletter in nonworking areas of the company’s property, during a

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64. *Id.*

65. *Id.* at 1288.

66. *Id.*

67. *Id.* at 1289.

68. *Id.* at 1290.

69. *Id.*

70. *Id.*

71. *See* N.L.R.B. v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962).

72. *See* N.L.R.B. v. City Disposal Sys., Inc., 465 U.S. 822, 837 (1984).

73. *See* *Compuware Corp.*, 134 F.3d at 1288.

74. *See* 437 U.S. 556, 566 (1978).

nonworking time.<sup>75</sup> The newsletter the employees were trying to hand out discussed how employees should oppose a state right-to-work statute and how the United States President recently vetoed a bill to increase minimum wage.<sup>76</sup> The company would not allow employees to distribute this newsletter in any nonworking area of the company.<sup>77</sup>

The Supreme Court answered two questions in this case, “whether [the] . . . distribution of the newsletter [was a protected] concerted activity” and, if it was in fact protected concerted activity, if the “fact that [it would have taken place on the company’s property gave] rise to a countervailing interest [which] outweigh[ed] [the employees’ Section] 7 rights . . . .”<sup>78</sup> The Supreme Court held that:

§ 7 makes clear, to protect concerted activities for the somewhat broader purpose of “mutual aid or protection” as well as for the narrower purposes of “self-organization” and “collective bargaining.” Thus it has been held that the “mutual aid or protection” clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees’ appeals to legislators to protect their interests as employees are within the scope of this clause.<sup>79</sup>

Therefore, employees engaged in political activity could also be partaking in protected concerted activity.<sup>80</sup> This holding, however, does not include all political activity in the work place as protected concerted activity, only certain kinds.<sup>81</sup>

Only political activity that is related to the “employees’ interests as employees” will be found to be protected concerted activity.<sup>82</sup> Once this relationship becomes “attenuated,” however, the employees’ political activity cannot be found to come within the scope of Section 7’s “mutual aid or protection” clause and is no longer protected activity.<sup>83</sup> The Court did not give a bright line rule for determining when this relationship is “too attenuated.”<sup>84</sup>

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75. *Id.* at 558.

76. *Id.* at 559.

77. *Id.* at 560-61.

78. *Id.* at 563.

79. *Id.* at 565-66.

80. *Id.*

81. *Id.* at 567-68.

82. *Id.*

83. *Id.* at 568.

84. *See id.* at 567-68.

An employee's political activity in the workplace can be protected concerted activity, but only where the relationship between the political activity and the employee's interest as an employee is not too attenuated.<sup>85</sup>

These cases have illustrated what will be protected as concerted activity. Bottom line, protests that are in some way political in nature can be protected as concerted activity, even if only a single employee is engaging in the protest. However, if that political protest is "too attenuated" to the employee's interest as employees, then it will not be protected.<sup>86</sup> Now with a better understanding of what is protected concerted activity, it is important to understand what exactly constitutes an unfair labor practice under the NLRA.

## 2. Unfair Labor Practice

Section 8(a)(1) explains what an unfair labor practice is. If an employer is found to be engaging in an unfair labor practice it would result in the employer being subject to sanctions.<sup>87</sup> The section states that an employer engages in an unfair labor practice when an employer engages in interference, restraint, or coercion of employees during the exercise of their statutorily protected rights stated in Section 7 of the NLRA.<sup>88</sup>

"It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guarantee in section 157 of this title."<sup>89</sup> For an employer to commit an unfair labor practice, they have to interfere in some way with the employees' rights provided in Section 7 of the NLRA. The definition itself seems straightforward, however case law will help to further define what constitutes interference, restraint, and coercion.

*National Labor Relations Board v. A. Lasaponara & Sons, Inc.*, deals with an employer's unlawful termination of employees.<sup>90</sup> In this case, employees signed a petition protesting scheduling Palm Sunday as a work day.<sup>91</sup> The plant manager refused to compromise or give in to the employees' demands.<sup>92</sup> On Palm Sunday multiple employees did not show up for their shift, but they did

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85. *Id.*

86. *Id.*

87. 29 U.S.C. § 158(a)(1).

88. *Id.*

89. *Id.*

90. *See generally* 541 F.2d 992 (2d Cir. 1976).

91. *Id.* at 998.

92. *Id.* at 997-98.

report the next day with nothing being said about the issue.<sup>93</sup> Two months later the employer fired those employees who failed to show up on Palm Sunday.<sup>94</sup>

The court held that these terminations constituted an unfair labor practice.<sup>95</sup> The termination of these employees effectively interfered with the employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>96</sup> The employees' actions served a legitimate work-related goal and was therefore protected by the NLRA.<sup>97</sup> When an employer fires employees because they engaged in concerted activities as defined by Section 7 of the NLRA, that constitutes an unfair labor practice.<sup>98</sup>

The next case involves an employer who interrogated multiple employees about an upcoming employee strike and ultimately fired those employees for organizing the strike.<sup>99</sup> A month after a planned employee work stoppage and the employees voicing their concerns to the plant manager about various working conditions that needed improvement, nothing changed; the employees then planned a second work stoppage.<sup>100</sup> On the day of the second planned work stoppage, one employee involved was asked to go to the supervisor's office where management questioned him about the work stoppage and proceeded to fire him.<sup>101</sup> Shortly after the first employee was fired, another employee involved in orchestrating the work stoppage was also fired.<sup>102</sup> Finally, on that same day management spoke to a third employee about the planned work stoppage, she was also subsequently fired.<sup>103</sup> The planned work stoppage did not happen after those three employees were fired.<sup>104</sup>

The court held that an employer is involved in an unfair labor practice when they terminate employees for "organizing or implementing a collective walkout to protest working conditions."<sup>105</sup> The protected activity the employees were engaged in must be the "motivating factor in the discharges."<sup>106</sup> The court explains that Section 8(c) of the NLRA recognizes that not all "displeased

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93. *Id.* at 998.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See generally *Greater Omaha Packing Co. v. N.L.R.B.*, 790 F.3d 816 (8th Cir. 2015).

100. *Id.* at 818-19.

101. *Id.* at 819.

102. *Id.*

103. *Id.*

104. *Id.* at 820.

105. *Id.* (quoting *JCR Hotel, Inc. v. N.L.R.B.*, 342 F.3d 837, 840 (8th Cir. 2003)).

106. *Id.* at 821.

communications from an employer to an employee are coercive.”<sup>107</sup> If communication from an employer to an employee does not include a threat of retaliation or force, or some promise of a benefit, that communication is not coercive.<sup>108</sup> To determine if the employer’s communication coerced employees not to be engaged in protected activity, the court will determine if the statements made “reasonably tended to coerce the employee not to exercise his right to engage in concerted activity.”<sup>109</sup>

When an employee’s action serves “a legitimate work-related goal”<sup>110</sup> or is organized and implemented to “protest working conditions”<sup>111</sup> any employer interference with this action will constitute an unfair labor practice. Therefore, under both Section 7 and Section 8(a)(1) if employees engage in a political protest, that relates to their interests as employees, serves a legitimate work-related goal, or is related to working conditions any employer interference with this action will most likely be an unfair labor practice. The next section will analyze a potential claim under the NLRA that an NFL player could bring, against his team or the NFL as a whole, and determine how successful that claim would likely be.

#### IV. ANALYSIS OF A POTENTIAL LABOR LAW CLAIM

The NLRA outlines what an unfair labor practice is—an employer who interferes, restrains, or coerces their employees while they are exercising protected Section 7 rights. Assuming the players’ national anthem protest falls under a protected Section 7 right it is clear that Jerry Jones comments about benching, or firing, any player who decides to protest the national anthem would be an unfair labor practice.<sup>112</sup> Jones’s comments would be viewed as an attempt to frustrate employees’ efforts to partake in protected concerted activity and an attempt to coerce employees not to partake in the protected concerted activity by including a threat of termination for doing so.<sup>113</sup> Those two factors alone would be enough to find Jones committed an unfair labor practice.<sup>114</sup> If Jones

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107. *Id.* at 822.

108. *Id.*

109. *Id.* at 822.

110. *National Labor Relations Board v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998 (2d Cir. 1976).

111. *Greater Omaha Packing Co.*, 790 F.3d at 820 (quoting *JCR Hotel, Inc. v. N.L.R.B.*, 342 F.3d 837, 849 (8th Cir. 2003)).

112. 29 U.S.C. § 158(a)(1). *See A. Lasaponara & Sons, Inc.*, 541 F.2d at 997-98; *see also Greater Omaha Packing Co.*, 790 F.3d at 820.

113. *See A. Lasaponara & Sons, Inc.*, 541 F.2d at 997-98; *see also Greater Omaha Packing Co.*, 790 F.3d at 822.

114. 29 U.S.C. § 158(a)(1). *See A. Lasaponara & Sons, Inc.*, 541 F.2d at 997-98; *Greater Omaha Packing Co.*, 790 F.3d at 822.

actually fired a player for protesting, assuming the protests are protected, it would be further proof that Jones and the Cowboys organization were committing an unfair labor practice.<sup>115</sup> However, this analysis of whether or not Jones and the Cowboys organization would be seen as committing an unfair labor practice because of Jones' comments *hinges* on whether or not the national anthem protests are actually protected concerted activity.<sup>116</sup>

As stated previously, concerted activity is not defined in the NLRA.<sup>117</sup> However, the previously mentioned case law gives a picture of what will be protected as concerted activity and what will not be protected. If employees begin protesting for a political reason, these protests may be protected as concerted activity, as long as the political issues are not "so attenuated" to the "employees interests as employees."<sup>118</sup> Even if an employee is acting individually during this protest, as long as that individual's actions were done with group intentions it will still be protected.<sup>119</sup> An individual employee's action may also be protected in an instance where they are asserting a right they honestly and reasonably believe they have under their collectively bargained agreement.<sup>120</sup> However, if the concerted activity is "unlawful, violent, in breach of contract, or indefensible," it will not be protected.<sup>121</sup>

It is clear that for the national anthem protests to be protected under Section 7 of the NLR Act, it needs to be *related to the players' interest as employees*.<sup>122</sup> The reason behind the players' protest has not changed; they are protesting racial oppression and police brutality targeting African Americans in America.<sup>123</sup> Even though many players have voiced that they believe the reason behind Kaepernick not getting picked up by another team after the 2016 season was the protest, they have not stated they are continuing to protest because of this perceived unfair treatment towards Kaepernick by team owners.<sup>124</sup>

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115. *Id.*

116. 29 U.S.C. § 158(a)(1).

117. *See* 29 U.S.C. § 157.

118. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 567-68 (1978).

119. *Compuware Corp. v. N.L.R.B.*, 134 F.3d 1285, 1288 (6th Cir. 1998).

120. *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984).

121. *N.L.R.B. v. Empire Gas, Inc.*, 566 F.2d 681, 686 (10th Cir. 1977).

122. *Eastex, Inc.*, 437 U.S. at 565-66.

123. SB Nation NFL, *NFL Protests 2017: What Are Players Protesting When Kneeling for the National Anthem?*, SB NATION (Sept. 28, 2017), <https://www.sbnation.com/2017/9/28/16376500/nfl-protests-2017-kneeling-national-anthem-why>.

124. *See id.*; *see also* Evan Grossman, *Eagles Players Malcolm Jenkins and Torrey Smith Question Why Colin Kaepernick Doesn't Have a Job Yet*, N.Y. DAILY NEWS, Mar. 23, 2017, <http://www.nydailynews.com/sports/football/eagles-jenkins-smith-question-kaepernick-doesn-job-article-1.3006796>.



It is my position that the national anthem protests most likely would not be protected under Section 7 of the NLRA as concerted activity. Even though these protests could be considered concerted activity since certain political activity is protected under Section 7, these protests are not related to the players' interest as employees in the NFL and therefore will likely not be protected.<sup>125</sup> Even though all aspects of the protests appear to make it protectable as concerted activity under Section 7, the protests are still lacking the most crucial aspect of making a concerted activity protectable. The protests are in no way related to the players' interest as employees in the NFL.

Some legal scholars have made claims that the reasoning for the protests do in fact concern the players' interest as employees in the NFL, but the arguments made illustrate just how attenuated the relationship is.<sup>126</sup> Benjamin Sachs, a professor of labor and industry at Harvard Law School, points out that racial discrimination, and police brutality, are things that affect all aspects of a person's life, and therefore, would have an impact on the players' lives as employees, even if the discrimination and brutality occurs off-the-job.<sup>127</sup> Sachs points out that even though off-the-job circumstances are not generally seen as affecting an employee's interest as an employee, a court will easily be able to distinguish this off-the-job circumstance from others.<sup>128</sup>

Sachs's first argument will likely not stand as a legal claim. The Supreme Court clearly stated that once the relationship between the political activity and the employee's interest as an employee becomes "so attenuated," the Court will not find this activity to be protected under Section 7.<sup>129</sup> Even though the Court did not draw a bright line determining where this relationship becomes too attenuated to be protected,<sup>130</sup> this argument that racial oppression and police brutality will inadvertently affect each and every aspect of someone's life, and will therefore have an impact on one's job, is a clear example of a relationship that is too attenuated. If these players were protesting racial oppression occurring within the NFL, that would change the protest because racial oppression occurring in the workplace is something that directly affects their interest as employees. In that example, the protest would be protected because it concerns the players' interest as players. However, protesting racial oppression in general does not meet the burden of affecting an employee's interest as an employee.

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125. *But see* Sachs, *supra* note 27.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 567-68 (1978).

130. *Id.*

Sachs's second argument is that since the player contract defines the job of an NFL player as a public one, all non-work and non-employment matters concern players in their role as players.<sup>131</sup> For that reason this type of protest would in fact be protected under Section 7.<sup>132</sup> The language Sachs points to is language concerning how a player is to conduct themselves on and off the field and that the success of the NFL depends on the public's respect of the game.<sup>133</sup> However, this language of a standard player contract is not defining the job as a public one, but instead giving team owners broad discretion to terminate a player for engaging in activity that in any way diminishes the "public respect" for the game and those associated with it.<sup>134</sup> This is similar to a moral clause found within an employment contract. This clause gives the employer the right to terminate the agreement should the employee engage in conduct that harms the employer's reputation.<sup>135</sup> These provisions are common in contracts of public figures, such as professional athletes. This is a way for the team owners to protect their interest, and does not turn the athlete's job into a public one.

Sachs's third and final argument is that if the players are protesting to display solidarity with fellow players they believe have been mistreated, the protests would be protected as concerted activity.<sup>136</sup> Sachs is right in this regard. Protesting unfair punishment by employers or unfair workplace practices are issues that affect employee's interest as employees and would definitely be protected as concerted activity, whether for political reasons or not.<sup>137</sup> However, the reason given for the protests has not changed since Kaepernick first communicated it to the media.<sup>138</sup> The protests have always been and continue to be about racial oppression and police brutality in America that disproportionately affects African Americans. If the players that continue to protest state that the reason for the continued protest had changed to Sachs's hypothetical, then the protests would be protected as concerted activity under Section 7 of the NLRA. But that is not the case here. Therefore, the protests will most likely not be protected as concerted activity should a player, the NFLPA, or a local union, bring a NLRA claim against a team owner or the League as a whole should a player be disciplined or fired for protesting.

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131. Sachs, *supra* note 27.

132. *Id.*

133. *Id.*

134. McCann, *supra* note 9.

135. *Morals Clause Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/m/morals-clause/> (last visited May 9, 2019).

136. Sachs, *supra* note 27.

137. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 567-68 (1978).

138. SB Nation NFL, *supra* note 123.

Ultimately, a player, the NFLPA, or a local union could very well bring a claim of unfair labor practices against a team owner or the League if a player were to be fired because of protesting. If a player was fired for this reason, the firing would be deemed an unfair labor practice *if* the court determines that the protest is related to the players' interest as players in the NFL, and is therefore protected concerted activity. However, this protest does not concern the players' interests as players in the NFL. Therefore, a labor law claim under Section 7 of the NLRA brought against a team owner or the League would likely fail because the relationship between the protests and the players' interest as players in the NFL is too attenuated to be protected.<sup>139</sup>

Unlike the NFL players, Abdul-Rauf was actually suspended for his national anthem protest. As mentioned previously, his protest center on religious reasons. Eventually Abdul-Rauf and the NBA came to a compromise, he agreed to stand for the national anthem but while he was standing he would bow his head and pray.<sup>140</sup> Abdul-Rauf's suspension only lasted one game.<sup>141</sup> Even though freedom of religion is protected by the United States Constitution, there is also a law that allows employees to legally exercise their religious freedom in the workplace.<sup>142</sup> The NFL protest on the other hand, is not tied to religious reasons meaning this same law would not protect the NFL players.

#### V. POSSIBLE SOLUTIONS

Since the players would likely not have a valid labor law claim against either a team owner or the League, the NFL should try to come up with a solution to the protests that appeases all sides. Even though a team owner or the NFL could legally fire a player or discipline them for protesting under the NLRA, this is not the best solution. Any solution that would result in a player being disciplined or fired for protesting would outrage half of the League's fan base. This outrage was well illustrated when the NFL tried to implement a new policy prior to the 2018 season that would have disciplined players. Instead, any solution should strive to shift the focus from the protests back to the game going on.

The first solution is to negotiate with the players to come to a solution that all parties agree to. The first potential solution is likely to fail. The league and

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139. *Eastex, Inc.*, 437 U.S. at 567-68.

140. Washington, *supra* note 28.

141. *Id.*

142. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2019). Abdul-Rauf never filed a claim against the NBA regarding the discipline he received for not standing for the national anthem, so there is no definitive answer if the NBA would have been in violation of either Title VII of the Civil Rights Act or in violation of the NLRA. See Washington, *supra* note 28.

its owners already tried to negotiate with the Players Coalition, with little success.<sup>143</sup> Even though the league and its owners agreed to donate around \$90 million to social activism causes, this agreement seemed to have caused more tension and did not end the protests as hoped.<sup>144</sup> This agreement led to many players leaving the Players Coalition stating they will continue to protest the national anthem with or without the league and owner's charitable donation.<sup>145</sup> If the league and owners tried to negotiate with the Players Coalition or try to negotiate with the players who have left the Coalition again, it will likely not be successful. This is not a good avenue to accomplish the goal of removing scrutiny from the NFL.

The second solution is for the League to institute a policy requiring players to stand at attention while the national anthem is being played, similar to the NBA policy. Instead of trying to negotiate a common solution again, the league could unilaterally institute a policy requiring players to stand and be respectful while the national anthem is played. Since the NBA already has a similar policy it would not be unprecedented.<sup>146</sup> However, this could lead to even more unrest among the players who are protesting, especially if they do not have a say in the policy change. This possible solution has the ability to open up the league to litigation. In addition to an increased risk of litigation, the players could come up with different ways to protest the national anthem to avoid fines or could continue to protest regardless of the fines they accrue. This result would cause even more media attention and scrutiny and would not be a success.

The third, and final, solution is to have both teams remain in the locker room while the national anthem is being played prior to a game. Once the national anthem is done the teams can each exit the locker room and the game can begin. The third possible solution is to not have either team on the sideline while the national anthem is played. In college football the national anthem is also played before each game, however the protests have not pervaded college football like it has the NFL.<sup>147</sup> The reason the protests have not occurred in college football is because the teams are not on the sidelines for the national anthem. Instead, the teams wait in the locker rooms while the national anthem plays and then once it is done, each team exits the locker room and makes their way onto the field. Changing the way, the national anthem is presented before a game may

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143. Maske, *supra* note 17.

144. *Id.*

145. *Id.*

146. Tim Cato, *Kneeling During the National Anthem? NBA Rule Actually Prohibits It*, SB NATION (Sept. 29, 2017), <https://www.sbnation.com/2017/9/25/16358070/national-anthem-protest-kneel-kneel-rule>.

147. Alex Kirshner, *College Football Protests: What've Coaches Said? Why Are They Less Common?*, SB NATION (Sept. 7, 2018), <https://www.sbnation.com/college-football/2017/9/26/16354940/protests-college-football-nfl-national-anthem>.

cause criticism in the beginning because it is a change in the way things have always been done, but ultimately this is the best way for the league and the teams to remove as much scrutiny as possible from the league and place the focus back on the game. This change in policy would eliminate the protests from occurring altogether. This would shift the focus from the protests to the game, something the NFL and the owners need to happen if mass amounts of players continue to protest. The networks could still broadcast the national anthem before each game, but the focus would solely be on the singer rather than the players protesting on the sidelines.

## VI. CONCLUSION

The national anthem protests started with Colin Kaepernick at the beginning of the 2016 NFL season. The protests continued throughout the 2017 NFL season and spread across multiple sports and media outlets. After comments from President Trump and Jerry Jones about firing players who decide to protest, the conversation shifted from is this the right thing to do, to is there a potential legal claim if a player really was fired for protesting.

From the plain language of the statute and case law, it is clear that even though firing a player for protesting would be considered an unfair labor practice, without the relationship between the reason for the protest and the players' interests as players there is no claim. There is no relationship between protesting racial oppression and police brutality in America and the players' interests as players in the NFL, therefore the protests would not be held to be protected and a labor law claim would fail. If the protests were about unfair wages, legislation directly affecting the NFL, unfair treatment of players within the League, or any number of employment issues that directly affect players' interests as employees then the protest would be protected. But that is not the case.

The players would not have a valid claim under the NRLA if a team owner or the NFL were to fire or discipline them for protesting. The best course of action for the NFL to take from here, to reduce scrutiny of the League and shift the focus back to the game, is to change the procedure of how the national anthem is presented. The NFL should follow college football's footsteps and not allow either team to be on the sidelines while the national anthem is performed, only allowing them to make their way onto the field once the national anthem is done. This is the best course of action for the NFL to take moving forward.